

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA

(DIVISION 2)

Nicolas v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FedCFamC2G 288

File number: MLG 492 of 2022

Judgment of: **JUDGE LADHAMS**

Date of judgment: 26 April 2022

Catchwords: **MIGRATION** – application for judicial review of Administrative Appeals Tribunal decision – refusal to grant Partner (Temporary) (Class UK) visa – whether Tribunal decision was unreasonable, irrational or illogical – no jurisdictional error – application dismissed.

Legislation: *Migration Act 1958* (Cth), ss 5F, 476, 477
Migration Regulations 1994 (Cth), reg 1.15A, Schedule 2
c11 820.211, 820.221

Cases cited: *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 397 ALR 1; [2022] FCAFC 3
He v Minister for Immigration and Border Protection (2017) 255 FCR 41; [2017] FCAFC 206
Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611; [2010] HCA 16
Nguyen v Minister for Immigration [2016] FCCA 32
Pelka v Secretary, Department of Family and Community Services (2006) 151 FCR 546; [2006] FCA 735
Sun v Minister for Immigration and Border Protection (2016) 243 FCR 220; [2016] FCAFC 52
SZOXF v Minister for Immigration and Border Protection (2015) 231 FCR 1; [2015] FCAFC 69

Division: Division 2 General Federal Law

Number of paragraphs: 68

Date of hearing: 11 April 2022

Place: Perth

Counsel for the Applicant:	Mr G Jegatheesan
Solicitor for the Applicant:	Dawes & Vary Riordan Lawyers
Counsel for the First Respondent:	Mr T Reilly
Second Respondent:	Submitting appearance, save as to costs
Solicitor for the Respondents:	Australian Government Solicitor

ORDERS

MLG 492 of 2022

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN: PETRONILA SERRANO NICOLAS
Applicant

AND: MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: JUDGE LADHAMS

DATE OF ORDER: 26 APRIL 2022

THE COURT ORDERS THAT:

1. The application is dismissed.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

JUDGE LADHAMS:

INTRODUCTION

1 Before the Court is an application filed on 3 March 2022, by which the applicant seeks judicial review of a decision of the Administrative Appeals Tribunal (Tribunal) made on 7 February 2022. The Tribunal affirmed an earlier decision made by a delegate of the Minister not to grant the applicant a Partner (Temporary) (Class UK) visa (partner visa). The application was filed pursuant to s 476 of the *Migration Act 1958* (Cth) (Migration Act).

2 The application contains a single ground which asserts that various aspects of the Tribunal's reasons are illogical, irrational or unreasonable. For the reasons set out below, I have found that this ground is not established. The application is therefore dismissed.

BACKGROUND

3 The applicant is a non-citizen who applied for the partner visa on 20 March 2018 on the basis of her relationship with the sponsor, Mr Bartlett (sponsor). The applicant and sponsor were married on 15 December 2017.

4 On 2 January 2020 a delegate of the Minister refused to grant the applicant a partner visa.

5 On 20 January 2020 the applicant lodged an application to the Tribunal for review of the delegate's decision. The Tribunal convened a hearing on 4 February 2022, at which the applicant presented arguments and gave evidence. The sponsor and two other witnesses also gave oral evidence.

6 On 7 February 2022 the Tribunal affirmed the decision under review.

TRIBUNAL DECISION

7 The Tribunal accepted that the applicant and the sponsor were validly married to each other on 15 December 2017 for the purposes of s 5F(2)(a) of the Migration Act. The Tribunal then proceeded to consider the factors set out in reg 1.15A(3) of the Regulations to determine whether a spousal relationship existed between the applicant and the sponsor.

Financial aspects of the relationship

- 8 The Tribunal acknowledged the applicant's evidence that she and the sponsor owned no real estate or other major assets together, had no joint liabilities, and had no legal obligations in respect of each other. The Tribunal accepted that the applicant and the sponsor had established a joint bank account. However, the Tribunal was not satisfied that the account was being used as a joint account, as the applicant's evidence at the hearing was that her income was paid to a separate account from which she pays her expenses. The Tribunal placed little weight on the joint account and was not satisfied that the applicant and the sponsor had ever combined their incomes. The Tribunal found that the financial aspects of the relationship did not attest to the applicant and the sponsor being in a spousal relationship.

Nature of the household

- 9 The Tribunal acknowledged the applicant's evidence that she and the sponsor have no joint responsibility for the care and support of children. The Tribunal accepted that the applicant and the sponsor previously lived together, shared various aspects of the day-to-day housework and that they now live separately. The Tribunal acknowledged the applicant's evidence that the sponsor now lives in a nursing home and is unlikely to return to live with the applicant. Based on the limited evidence before the Tribunal, the Tribunal was not satisfied that the nature of the household attested to a genuine and continuing spousal relationship between the applicant and the sponsor.

Social aspects of the relationship

- 10 The Tribunal accepted the applicant's evidence that she and the sponsor represent themselves to other people as being a married couple although they no longer live together, and that they attended a number of different functions and clubs as a couple prior to the sponsor moving into the permanent care facility. The Tribunal placed some weight on the overall social aspects of the relationship.

Nature of the applicant's and the sponsor's commitment to each other

- 11 The Tribunal accepted that the applicant first met the sponsor in 2008 when the sponsor was travelling through the applicant's home country with his ex-wife. However, due to a lack of supporting evidence, the Tribunal gave little weight to the applicant's claims that the sponsor paid for her to come to Australia in 2010, 2014 and 2017, that she and the sponsor spoke on the telephone, and that the sponsor sent financial support payments to her.

12 The Tribunal expressed concern that the applicant lodged carer visa applications with the Department on two occasions in October 2017. The Tribunal gave little weight to a joint statement by the applicant and the sponsor, claiming that they had been provided with incorrect advice regarding the carer visa applications and that the applicant should have applied for a partner visa, because the applicant had not provided further detail to support the claim that she received incorrect advice.

13 The Tribunal accepted that the applicant and the sponsor had lived together, but was not satisfied that they drew a significant degree of companionship and emotional support from each other. The Tribunal found that the applicant and the sponsor do not see the relationship as being long-term or that they have a mutual commitment to a shared life to the exclusion of all others.

Tribunal's conclusion

14 The Tribunal was not satisfied that the requirements of s 5F(2)(b)-(d) of the Migration Act were met at the time of application and at the time of the decision. Therefore, the applicant did not meet cl 820.211 and 820.221 in Schedule 2 to the *Migration Regulations 1994* (Cth) (Regulations).

PROCEEDINGS BEFORE THIS COURT

15 The application for judicial review was filed on 3 March 2022, within 35 days of the date of the Tribunal decision as required by s 477(1) of the Migration Act.

16 The applicant advances one ground of review in her written application:

The Tribunal's decision to dismiss the application on 7 February 2022 (**Decision**) constituted an unreasonable, irrational and/or illogical exercise of administrative discretion and was thereby affected by jurisdictional error, to the extent that the Tribunal's reasons for the Decision (**Reasons**) disclose that:

- a. The Tribunal erroneously concluded that the financial aspects of the relationship do not attest to the applicant and sponsor being in a genuine and continuing relationship and they had a mutual commitment to a shared life as a married couple to the exclusion of all others at the time of the visa application (at [15] of the Reasons), notwithstanding the Tribunal's conclusion that the applicant and sponsor had established a joint Bendigo Bank Account in or around May 2018 into which deposits were made by the Sponsor when receiving his fortnightly Centrelink pension (at [13] of the Reasons);
- b. The Tribunal erroneously concluded that it was not satisfied that the nature of the household attests to the genuine and continuing spousal relationship with the parties (At [22] of the Reasons), notwithstanding the Tribunal's

conclusion that until recently, the applicant and sponsor co-habited and shared various aspects of the day-to-day housework [at [18] of the Reasons);

- c. The Tribunal erroneously concluded that it was not satisfied the applicant and the sponsor draw a significant degree of companionship and emotional support from each other, or that they have a mutual commitment to a shared life together to the exclusion of all others (at [37] and [38] of the Reasons) notwithstanding the unchallenged evidence of:
 - i. Photos of the couple together and with third parties (At [23] of the Reasons);
 - ii. Six Form 888 statutory declarations from the applicant, the sponsor, Ms Lorraine Wilson (the applicant's sister in law and sponsor's sister); Ms Lorraine Harris (neighbour of the applicant); Mr Leigh Wilson (nephew of the sponsor); Mr Donald Eaton (at [23] to [35] of the Reasons)
- d. In erroneously concluding that it was not satisfied that the applicant and the sponsor draw a significant degree of companionship and emotional support from each other or that they have a mutual commitment to a shared life together to the exclusion of all others (at [37] and [38] of the Reasons), the Tribunal placed excessive and unreasonable weight on the fact that:
 - i. The applicant attempted unsuccessfully on two occasions to lodge carer visa applications in October 2017, despite the unchallenged evidence jointly provided by the applicant and the sponsor dated 9 December 2019 that the applicant had received incorrect advice regarding the carer visa applications (at [36] of the Reasons);
 - ii. The sponsor is now living in permanent care in a nursing home and may have a limited life expectancy (at [38] of the Reasons).

SUBMISSIONS OF THE PARTIES

Applicant's submissions

- 17 The applicant submitted that the Tribunal's decision to affirm the delegate's decision constituted an unreasonable, irrational or illogical exercise of administrative discretion. This was said to be evident having regard to the reasoning adopted by the Tribunal, in its totality and with respect to its conclusions directed to the 'financial aspects', 'nature of the household' and 'emotional support and mutual commitment' indicia of those matters set out in reg 1.15A(3) of the Regulations. The applicant further submitted that the Tribunal took into account collateral and irrelevant matters regarding previous visa applications made by the applicant.
- 18 The applicant submitted that the Tribunal erroneously concluded that the financial aspects of the relationship do not attest to the applicant and the sponsor being in a genuine and

continuing relationship and having a mutual commitment to a shared life as a married couple to the exclusion of all others. The Tribunal accepted that the applicant and the sponsor had established a joint bank account in 2018 into which deposits were made by the sponsor. The Tribunal identified two main concerns with the applicant's evidence: that the deposits into the bank account up until November 2021 were made by the sponsor and that there was no evidence of the applicant's claimed casual kitchenhand income being deposited into the account. The applicant submitted that the Tribunal reduced the consideration of the financial aspects of the relationship to a mere consideration of whether funds were jointly transferred to the one bank account, without any meaningful criticism or engagement with the evidence of the combined financial relationship of modest means, in circumstances where the applicant worked in a relatively low-paying occupation.

19 The applicant submitted that the Tribunal's conclusion in relation to the nature of the household was unreasonable because of its factual findings that, until recently, the applicant and the sponsor co-habited and shared various aspects of the day-to-day housework. The applicant submitted that the Tribunal placed excessive and unreasonable weight on the fact that the applicant and the sponsor no longer lived with each other, and disregarded that this circumstance was brought about by the deteriorating health of the sponsor. The applicant further submitted that the Tribunal unreasonably disregarded the evidence of joint housework and household participation during the time that she and the sponsor lived together.

20 The applicant submitted that the Tribunal giving only 'some weight' to the overall social aspects of the relationship and finding that it was not satisfied that the couple drew a significant degree of companionship and emotional support from each other, appeared to be linked to two collateral and irrelevant findings, namely:

- (a) the applicant lodged carer visa applications with the Department on two occasions in October 2017; and
- (b) the sponsor is now living in permanent care in a nursing home and may have a limited life expectancy.

21 The applicant submitted that there was no factual inconsistency identified or critique posed based on any alleged absence of credibility in relation to the joint evidence of the applicant and the sponsor that the filing of the carer applications was erroneous and based on incorrect advice. The Tribunal merely observed that it would give little weight to the evidence because the applicant did not provide any further detail in support of the incorrect advice regarding

the carer visa applications. The applicant further submitted that the Tribunal's conclusion that the applicant only applied for the partner visa to gain a migration outcome was perverse and in blatant contradiction to the evidence presented.

22 The applicant submitted that, taking into account the evidence before the Tribunal, including but not limited to the evidence that the applicant continues to visit the sponsor on a daily basis and that the couple continue to refer to each other as being married, it was patently unreasonable for the Tribunal to posit that the sponsor's need to live in a nursing home, and the fact of his deteriorating health, impugns the stipulated matters.

23 Mr Jegatheesan's oral submissions were largely consistent with his written submissions. Mr Jegatheesan in his oral submissions sought to characterise some of the alleged jurisdictional errors differently to the way this was set out in his pleaded case. In addition to asserting that the Tribunal decision was illogical, irrational or unreasonable, Mr Jegatheesan characterised some of the Tribunal's findings as findings made without evidence, findings made without a proper genuine and realistic consideration of the evidence before the Tribunal, and that the Tribunal inserted a requirement that does not arise on the face of the legislation. The Minister objected to the expansion of the applicant's grounds. The applicant responded to this in two ways. The first was to submit that all of these issues are obvious on the face of his written submissions in any event. The second was to assert that legal unreasonableness can be a conclusion reached after some other underlying jurisdictional error is established.

24 Also in his oral submissions, Mr Jegatheesan referred to cl 820.221(2) of the Regulations that allows an applicant for a partner visa to still meet the time of decision criteria in certain circumstances, even if their spouse has died. Mr Jegatheesan submitted that the Tribunal's reasoning in the present matter places the applicant and sponsor in a 'black hole', because the Tribunal is saying that because the sponsor has a limited life expectancy and is in permanent care, there cannot be a mutual commitment to a shared life, yet cl 820.221(2) contemplated that an applicant can still proceed with their application even if the sponsor dies.

Minister's submissions

25 The Minister submitted that there is no basis for the applicant's submission that the Tribunal disregarded or failed to engage with the applicant's evidence in relation to the financial aspects of the relationship. The Tribunal was not convinced that the objective evidence presented by the applicant indicated a pooling of income or the sharing of day-to-day

household expenses. The Minister submitted that reasonable minds could differ about this conclusion on the evidence that was before the Tribunal and the conclusion is not legally unreasonable, illogical or irrational.

26 The Minister submitted that the Tribunal's conclusion that the applicant and sponsor no longer lived together was open to it and is not illogical or irrational. The Tribunal could not find there was a married relationship if the applicant and the sponsor lived separately and apart on a permanent basis. The Minister submitted that there is no basis to suggest that the Tribunal disregarded evidence it expressly mentioned about the nature of the household when the applicant and the sponsor lived together.

27 The Minister submitted that reasonable minds could differ about the Tribunal's conclusion that it was not satisfied that the applicant and the sponsor drew a significant degree of companionship and emotional support from each other. The Tribunal noted evidence that indicated that the applicant was the carer for the sponsor. There was no basis to infer that the Tribunal failed to consider the evidence of the applicant, the sponsor or the witnesses and the Tribunal was not bound to accept this evidence. The Minister further submitted that reasonable minds could differ about the Tribunal's conclusion that the applicant only applied for the partner visa to gain a migration outcome.

28 Mr Reilly's oral submissions were consistent with his written submissions. In response to the applicant's additional characterisation of the jurisdictional error alleged in the written application, Mr Reilly submitted that he is only required to deal with the written application and it is not necessary nor fair to expect the Minister to deal with the expanded grounds.

RESOLUTION

Scope of application

29 The application before the Court is the written application filed on 3 March 2021. The applicant submitted that the grounds she relies on are essentially the same as the ground in the written application and I consider the application on that basis. It is unfortunate in this case that the particulars in the application did not put the Minister on notice that the applicant seeks to characterise the alleged jurisdictional error on multiple bases. I have addressed the applicant's ground primarily on the basis that it was advanced in the written application, but I am satisfied that the outcome of this matter would be the same whether the errors that the Tribunal is alleged to have made are characterised as illogicality, irrationality or

unreasonableness, or making a finding with no evidence, or failing to give proper genuine and realistic consideration to the evidence, or inserting a requirement that is not evident on the face of the legislation.

Relevant legislation and legal principles

30 Before considering whether the Tribunal decision or process of reasoning is illogical, irrational or unreasonable, it is useful to identify the statutory task that the Tribunal was required to perform.

31 The issue for the Tribunal was to determine whether the applicant was the ‘spouse’ of the sponsor, as defined in s 5F of the Migration Act. That section relevantly provides:

- (1) For the purposes of this Act, a person is the *spouse* of another person (whether of the same sex or a different sex) if, under subsection (2), the 2 persons are in a married relationship.
- (2) For the purposes of subsection (1), persons are in a *married relationship* if:
 - (a) they are married to each other under a marriage that is valid for the purposes of this Act; and
 - (b) they have a mutual commitment to a shared life as a married couple to the exclusion of all others; and
 - (c) the relationship between them is genuine and continuing; and
 - (d) they:
 - (i) live together; or
 - (ii) do not live separately and apart on a permanent basis.
- (3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

32 Regulation 1.15A of the Regulations sets out circumstances of the relationship that a decision-maker must consider when deciding whether one or more of the conditions in s 5F(2)(a)-(d) exist. The relevant circumstances are listed in reg 1.15A(3) which provides:

The matters for subregulation (2) are:

- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

- (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
- (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
- (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
- (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.

33 The obligation of the Tribunal to take into account the factors set out in reg 1.15A(3) of the Regulations was considered by the Full Court in *He v Minister for Immigration and Border Protection* (2017) 255 FCR 41; [2017] FCAFC 206 (*He*). The Full Court said at [76]-[77]:

76. In our opinion, the requirement that the Tribunal “consider” the circumstances in reg 1.15A(3) means that the Tribunal is required to make findings upon each of the prescribed matters numbered with Roman numerals. The nature of these specific matters is such that each of them poses, in effect, a question or questions for the Tribunal. For example, in respect of “the nature of the household”, the Tribunal must ask:

- (i) whether there are children and whether there is any joint responsibility for their care and support;
- (ii) what the living arrangements of the persons are; and
- (iii) whether and to what extent there is sharing of the responsibility for housework.

The regulation poses these questions in order to ensure that the Tribunal takes into account particular circumstances of the marriage as part of the active mental process involved in giving proper, genuine and realistic consideration

to the prescribed matters. The legislative intention must be that these questions will be answered, not merely thought about. They must be answered so that the circumstances identified by the answers are included in the evaluation of whether there is a “married relationship”. In some cases, the Tribunal’s answer may be that there is no material, or insufficient material, to be able to form a conclusion on a prescribed matter: cf *Paerau* at [27], [69] and [119]. However, there must be an answer, or, in other words, a finding, even if the finding is that no conclusion can be reached upon the matter.

77. So far, we have discussed the requirement for the Tribunal to make findings in respect of the specific matters in reg 1.15A(3) numbered with Roman numerals. It is also necessary to consider whether findings are required in respect of the principal matters in paras (a)-(d), namely the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the persons’ commitment to each other. These matters are expressed broadly and it is less obvious that they pose questions that are required to be answered. Nevertheless, they should be seen as doing so, having regard to the questions that are then immediately posed in connection with each of the principal matters. In our opinion, the requirement to “consider” the principal matters means that a decision-maker must make findings upon each of them. In many cases, the requirement to make findings upon the principal matters may be satisfied by the course of making findings upon the specific matters. For example, the Tribunal may make a finding that the nature of the household is one where the parties have no children, they live together and they share responsibility for housework equally.

34 It is clear from the legislation and the Full Court’s judgment in *He* that the Tribunal was required to consider each of the factors set out in reg 1.15A(3) of the Regulations and form an overall view of whether the applicant was the spouse of the sponsor. No single factor is determinative.

35 There is no real dispute between the parties in relation to the principles to be applied in this matter in determining whether the decision is unreasonable, illogical or irrational.

36 The Minister has referred to *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; [2010] HCA 16 as being the leading High Court authority in relation to illogicality and irrationality in fact finding by the Tribunal. In that case, Crennan and Bell JJ said at [131] and [135]:

131. ... The complaint of illogicality or irrationality was said to lie in the process of reasoning. But, the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion.

...

135. ... Whilst there may be varieties of illogicality and irrationality, a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker. A decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn...

37 Both parties have also submitted that useful guidance can be gained from the judgment of the Full Court of the Federal Court in *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 397 ALR 1; [2022] FCAFC 3. In that case, the Full Court said at [33]-[35]:

33. The characterisation of a decision (or a state of satisfaction) as legally unreasonable because of illogicality or irrationality is not easily made: *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541; 357 ALR 408; 163 ALD 1; [2018] HCA 30 at [11], [52], and [135]; *Minister for Home Affairs v DUA16* (2020) 385 ALR 212; [2020] HCA 46 at [26]; *SZMDS* at [130]–[135]; *CQG15 v Minister for Immigration and Border Protection* (2016) 253 FCR 496; [2016] FCAFC 146 at [60]; and *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* (2021) 395 ALR 57; [2021] FCAFC 195 at [142].
34. The task in assessing illogicality is not an exercise in logical dialectic. “Not every lapse of logic will give rise to jurisdictional error. A Court should be slow, although not unwilling, to interfere in an appropriate case”: *SZDMS* at [130]. It is the ascertainment, through understanding the approach of the decision-maker and characterising the reasoning process, of whether the decision (or state of satisfaction) is so lacking a rational or logical foundation that the decision (or relevant state of satisfaction) was one that no rational or logical decision-maker could reach, such that it was not a decision (or state of satisfaction) contemplated by the provision in question. Some lack of logic present in reasoning may only explain why a mistake of fact had been made which can be seen to be an error made within jurisdiction. As the Chief Justice said in *Stretton* at [11], the evaluation of whether a decision was made within lawful boundaries is not definitional, but one of characterisation and whether the decision was sufficiently lacking in rational foundation, having regard to the terms, scope and purpose of the statutory source of power, that it cannot be said to be within the range of possible lawful outcomes.
35. Ultimately, the question is whether the satisfaction of the relevant state of affairs or matter was irrational, illogical or not based on findings or inferences of fact supported by logical grounds: *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12; 78 ALD 224; [2004] HCA 32 at [38]; *Re Minister for Immigration and Multicultural Affairs; Ex Parte Applicant S20/2002* (2003) 198 ALR 59; 73 ALD 1; [2003] HCA 30 at [52] and [173], such that it cannot be said to be possible for the conclusion to be made or the satisfaction reached logically or rationally on the available material. It will then satisfy the characterisation of unjust, arbitrary or capricious.

38 I take these principles into account in assessing the ground raised by the applicant.

Financial aspects of the relationship

39 The applicant's assertion that the Tribunal reached an unreasonable finding on the financial aspects of the relationship is based on the existence of evidence that the applicant considers to be persuasive. There was evidence before the Tribunal that the applicant and sponsor had a joint bank account and that the sponsor's Centrelink payments were paid to this account. The Tribunal considered this account in assessing whether the financial aspects of the relationship supported a finding that the applicant and sponsor were in a genuine and continuing relationship.

40 The Tribunal, however, was not satisfied that the bank account statements showed that both parties were using this joint account to pool their finances. The Tribunal's reasons for this finding are primarily set out at [13] of its reasons, where the Tribunal said:

The Tribunal accepts that the applicant and sponsor have established a joint Bendigo Bank account with evidence on the Department file indicating the account was in existence as of 15 May 2018. The most current evidence of the joint Bendigo Bank account on the Tribunal file is up until 10 November 2021. The concern for the Tribunal in relation to this account is that the only deposits into this account are that of the sponsor when he receives his fortnightly Centrelink pension. There is no evidence before the Tribunal that the applicant's claimed casual kitchen hand income from the [place name] RSL is deposited into this account as stated in the applicant's submission. At hearing, the applicant informed the Tribunal that her income from the [place name] RSL is paid into another account, a CBA account, and that she pays other expenses from this account. Given this, the Tribunal is not satisfied that the joint Bendigo account is used as a joint account as claimed, and for these reasons the Tribunal places little weight on the account that they combine their finances.

41 The Tribunal's reasons for not accepting that the joint bank account demonstrated that the applicant and sponsor were pooling their financial resources are clear and cogent. The conclusions reached by the Tribunal were clearly open to it on the evidence before it. While a different decision-maker might have reached a different conclusion, it is a matter about which reasonable minds may differ. There is nothing illogical, irrational or unreasonable in the Tribunal's finding at [13].

42 Further, contrary to the applicant's submission, the Tribunal did not reduce its consideration of the financial aspects of the relationship to a mere consideration of whether funds were jointly transferred to the one bank account, without any meaningful criticism or engagement with the evidence of the combined financial relationship of modest means. The Tribunal in its reasons has clearly considered each of the factors within the sub-paragraphs of reg 1.15A(3)

(a) of the Regulations. The Tribunal acknowledged at [12] of its reasons that there was no joint ownership of real estate or other major assets, no joint liabilities, and that neither the applicant nor the sponsor owed any legal obligation in respect of the other. The Tribunal considered at [13] the extent of any pooling of financial resources. At [14], the Tribunal considered the evidence about the basis of sharing day-to-day household expenses. The Tribunal considered the receipts for utility bills that were in joint names, but was not satisfied that the receipts demonstrated that the funds came from the joint bank account or that the applicant and sponsor shared their day-to-day living expenses.

43 Having considered all of the factors in the sub-paragraphs of reg 1.15A(3)(a), the Tribunal found that the financial aspects of the relationship did not attest to the applicant and the sponsor being in a genuine and continuing relationship and having a mutual commitment to a shared life as a married couple to the exclusion of all others at the time of the visa application. Taking into account all of the evidence that was before the Tribunal, and the reasons provided by the Tribunal, this conclusion was clearly open to the Tribunal. There is nothing illogical, irrational or unreasonable in the conclusion or the process of reasoning adopted by the Tribunal.

Nature of the household

44 The applicant's submission about the Tribunal's reasoning in relation to the nature of the household is essentially that the Tribunal placed excessive weight on the findings that the sponsor is now living in a nursing home and is unlikely to ever live with the applicant again in concluding that it was not satisfied that the nature of the household attests to a genuine and continuing spousal relationship.

45 In considering the matters set out in the sub-paragraphs of reg 1.15A(3)(b) of the Regulations, the Tribunal identified that there was no joint responsibility for the care and support of children, that the applicant and the sponsor lived together until the sponsor moved into a nursing home and the applicant now lives with the sponsor's sister, and that when the applicant and the sponsor did live together they shared various aspects of the day-to-day housework. The Tribunal's lack of satisfaction that the nature of the household attested to the genuine and continuing spousal relationship is said to be based on the limited evidence on the Department and Tribunal files and the oral evidence given at the hearing: see Tribunal reasons at [22].

46 I accept that the Tribunal appears to have given significant weight to the fact that the applicant and the sponsor were no longer living together in its overall conclusion on the nature of the household. However, I do not accept that the weight placed on this was excessive, or that the Tribunal made a decision, or engaged in a process of reasoning, that was illogical, irrational or unreasonable.

47 The applicant gave evidence to the Tribunal that it was unlikely that she and the sponsor would live together as a couple in the future. This is recorded at [20] of the Tribunal's reasons, where it said:

The applicant informed the Tribunal that she moved out of the property at [address 1] on 15 October 2021 and that she now lives with the sponsor's sister at [address 2]. The applicant further mentioned in her statutory declaration that it is unlikely she and the sponsor will ever live together again as a couple. At the hearing, the applicant confirmed this statement.

48 This is probative evidence that the Tribunal was entitled to rely on in reaching its decision. There is no indication in the evidence before the Court that the Tribunal has misunderstood or misinterpreted this evidence, and the applicant has not submitted that the evidence has been misunderstood or misinterpreted.

49 The applicant has also submitted that it was illogical, irrational or unreasonable for the Tribunal to conclude that the nature of the household did not support a spousal relationship in circumstances where the height of the evidence was that it was unlikely that the applicant and the sponsor would again live together as a couple. I cannot accept this submission. Although it is not appropriate to talk of onus of proof in administrative decision-making, it is well-established that it is for an applicant for a visa to provide evidence and advance submissions which are sufficient to enable the Tribunal to make a favourable decision: *Sun v Minister for Immigration and Border Protection* (2016) 243 FCR 220; [2016] FCAFC 52 at [69]. The Tribunal's lack of satisfaction that the applicant and the sponsor did not live separately and apart on a permanent basis was not illogical, irrational or unreasonable in circumstances where the applicant herself gave evidence that it was unlikely that she and the sponsor will live together as a couple in the future.

50 While it may have been open to a different decision-maker to reach a different conclusion on the nature of the household, the Tribunal did not act illogically, irrationally or unreasonably in reaching the decision it did.

Degree of companionship and emotional support

51 Particulars (c) and (d) of the ground of application both challenge the Tribunal's findings in relation to the degree of companionship and emotional support that the applicant and the sponsor draw from each other.

52 Particular (c) asserts that the Tribunal's conclusion that the applicant and the sponsor did not draw a significant degree of companionship and emotional support from each other was illogical, irrational or unreasonable taking into account photographs that were provided and statutory declarations from the applicant, the sponsor and various witnesses. The Tribunal considered much of this evidence under the heading 'Social aspects of the relationship'. It also considered some of the evidence under the heading 'Nature of the persons' commitment to each other'. The Tribunal accepted and placed some weight on the photographs and some of the statements. Where it placed less weight on statements, it gave cogent reasons for doing so. For example, the Tribunal gave some of the statutory declarations limited weight based on the time that has elapsed since the statutory declarations were completed, 'the limited information provided and the change in the circumstances of the sponsor'. It is entirely orthodox for the Tribunal to give less weight to a document that contains limited information and is lacking in detail. I do not interpret the Tribunal's reasons as a suggestion that it gave less weight to the documents simply because the statutory declarations had been made some time ago. Rather, the relevance of the age of the statutory declarations is that there had been a material change in circumstances for the sponsor since the statutory declarations were made and therefore the statutory declarations did not address the current circumstances of the applicant and the sponsor. There is nothing unreasonable, illogical or irrational in the Tribunal placing limited weight on those statutory declarations in those circumstances.

53 The applicant further submitted that it was unreasonable for the Tribunal, notwithstanding the evidence before it, to find at [37] that:

...the Tribunal is not satisfied that the couple draw a significant degree of companionship and emotional support from each other. On the evidence, the Tribunal finds that the persons do not see the relationship as being long-term or that the couple has a mutual commitment to a shared life together to the exclusion of all others.

54 The applicant submitted that there was no basis to disregard any positive evidence and there were no adverse credibility findings made by the Tribunal. In my view, the Tribunal's reasons do not disclose jurisdictional error. The Tribunal is not required to uncritically accept all

evidence provided by the applicant and the sponsor or other witnesses. It was open to the Tribunal to place weight on the different evidence in the manner that it did.

55 Particular (d) takes issue with the weight that the Tribunal gave to the carer applications lodged by the applicant and the evidence that the sponsor is now living in permanent care in a nursing home and may have a limited life expectancy.

56 Again I am not satisfied that this gives rise to jurisdictional error. The Tribunal, in addressing the carer applications, took into account the evidence that the applicant and sponsor had been given incorrect advice which caused them to apply for the carer visas in error. However, the Tribunal was not persuaded by that evidence, in particular because of the lack of detail in it, in circumstances where the applicant had ample time to provide details. This reasoning process and conclusion were open to the Tribunal. There is nothing unreasonable in the weight that the Tribunal attributed to the evidence in relation to the carer visa applications.

57 It is not clear that the Tribunal put any significant weight, for the purposes of assessing the nature of the commitment, on the evidence that the sponsor is now living in permanent care in a nursing home. Indeed, there is minimal reference to this evidence in the section of the Tribunal's reasons dealing with the nature of the commitment. After setting out the evidence in the applicant's statutory declaration about the nature of the commitment, the Tribunal noted at [34] the evidence given at the hearing about the month that the sponsor moved into the aged care facility, and it had regard to this evidence in its conclusion at [38] where it said:

The Tribunal notes that the sponsor is now living in permanent care in a nursing home and that he may have a limited life expectancy however given that the applicant initially applied for a carer visa on two occasions, which is a permanent visa, the Tribunal is of the view that the applicant only applied for the partner visa to gain a migration outcome. For these reasons and having regard to the circumstances of the relationship, the Tribunal is not satisfied that when the application was made and at the time of this decision, the applicant and sponsor demonstrated a mutual commitment to a shared life to the exclusion of all others. The Tribunal is not satisfied that their relationship is genuine and continuing. The Tribunal is not satisfied that they live together or do not live separately and apart on a permanent basis.

58 The Tribunal has given a cogent and intelligible justification for its conclusion. Reasonable minds may differ, but this does not give rise to jurisdictional error.

Overall assessment by the Tribunal

59 The Minister submitted at the hearing that it is presumed that the applicant is challenging the decision as a whole, noting that for unreasonableness, illogicality or irrationality to amount to jurisdictional error it must affect the decision as a whole.

60 Looking at the decision as a whole and the overall weighing of the factors, the Tribunal has made a decision that was open to it on the evidence before. While others may have come to a different decision, it is a matter about which reasonable minds may differ and there is no jurisdictional error.

Further matters

61 At the hearing, I asked both counsel if they were aware of any authorities that addressed how the Tribunal should proceed where one party to a relationship is in permanent care. I considered that such authorities might be relevant to the applicant's submissions in relation to the Tribunal's findings in the nature of the household, as well as a submission made by the Minister in relation to futility. Neither counsel identified any authorities at the hearing and I gave leave for both parties to email my chambers after the hearing to identify any authorities on this point. The applicant referred me to the following authorities:

- (c) *SZOXF v Minister for Immigration and Border Protection* (2015) 231 FCR 1; [2015] FCAFC 69 (*SZOXF*) at [14]-[59], [60], [65];
- (d) *Nguyen v Minister for Immigration* [2016] FCCA 32 at [30]; and
- (e) *Pelka v Secretary, Department of Family and Community Services* (2006) 151 FCR 546; [2006] FCA 735 at [36]-[47].

62 The email providing these authorities also contained submissions, and the Minister's representative objected to this on the basis that I did not grant leave to provide further submissions. Via my associate, I indicated to the parties that I proposed to have regard only to the authorities referred to, and not any submission provided in the email, and that I would consider the authorities in the context of the existing ground. Neither party objected to the course I proposed.

63 In reviewing these authorities, the main proposition that I would draw from them is that the consideration of whether the applicant and the sponsor are living separately and apart on a permanent basis involves an emotional component as well as a physical component. This can be seen most clearly in the following extract from *SZOXF*:

54. Several conclusions can therefore be drawn from this long history of the phrase “live separately and apart” at the time that this phrase was first introduced into the *Migration Regulations 1989*.
55. **First**, the phrase denoted both a physical and a mental element. Although there was dispute about whether the phrase was a composite one embodying both elements (*Santos v Santos* [1972] Fam 247, 258) or whether “separate” embodied a mental element and “apart” embodied a physical element (*Crabtree v Crabtree* (1963) 5 FLR 307, 319 – 320 (Nagle J), ultimately, that dispute was only a semantic one: *Crabtree v Crabtree* (1963) 5 FLR 307, 312 (Sugerman and Dovey JJ).
56. **Secondly**, the mental element was independent of whether the parties lived in the same house. The mental element involved the intention of the parties to live separate lives following the destruction of the marital relationship (*consortium vitae*).
57. **Thirdly**, although the physical element required some physical separation of the parties, the ultimate question was not whether the parties were physically living together in the same house. Even living in the same house could involve the parties being “separate and apart”. The focus on the physical element was upon whether their physical behaviour involved “living lives separate and apart from one another”. That could occur in the same house. Conversely, it might have been possible for a husband and wife who maintained separate residences to fail to meet the physical element if, as a whole, their lives were lived as a single household.
58. **Fourthly**, the reference to ‘cohabitation’ in s 69(6) of the *Supreme Court Act 1935-1947* (WA) and also in s 28(m) of the *Matrimonial Causes Act* was not treated as having altered this physical element to require ‘habitation’ in separate houses rather than as separate households. Those provisions, as considered by the High Court in *Main v Main*, and the Full Court of the Supreme Court of New South Wales in *Crabtree v Crabtree* provided:

... where the husband and wife have lived separately and apart for a period of not less than five years immediately prior to the presentation of the petition *and it is unlikely that cohabitation will be resumed*. (Emphasis added).

Much the same requirement was included in s 48(3) of the *Family Law Act 1975*, which provided that there could be no dissolution of marriage if the court were satisfied that there was “a reasonable likelihood of cohabitation being resumed”.

59. The conclusions relevant to s 5CB(2)(c)(ii) of the *Migration Act* that can be drawn from the history of the phrase “live separate and apart” are therefore that:
 - (1) both the physical and mental elements of the phrase were concerned with a husband and wife who were living their *lives* separate and apart from each other as separate households;
 - (2) the phrase therefore did not require that the parties live in different homes but rather focuses upon whether they lived their lives separately as separate households;
 - (3) conversely the phrase “not living separately and apart on a permanent basis” focuses upon whether the parties will not live as

separate

households on a permanent basis;

- (4) even when legislation was enacted which included the requirement that it be “unlikely that cohabitation will be resumed”, the Full Court of the Supreme Court of New South Wales had held that living in a separate house was not required; and
- (5) later legislation in 1975 that included the satisfaction requirement of no reasonable likelihood that cohabitation will be resumed also included an express provision that the “parties to a marriage may be held to have separated and to have lived separately and apart notwithstanding that they have continued to reside in the same residence”.

64 There is nothing before the Court from which I can conclude that the Tribunal did not understand that there is an emotional component to whether the applicant and the sponsor live separately and apart on a permanent basis. Further, and in any event, this is not a case where the Tribunal found that the applicant and the sponsor were in a spousal relationship until the sponsor moved into a permanent care facility. Rather, the Tribunal was not satisfied that the applicant and the sponsor were ever in a spousal relationship within the meaning in s 5F of the Migration Act, having considered evidence about the various factors in reg 1.15A(3) pertaining to the periods both before and after the sponsor moved into a permanent care facility.

65 The interpretation of the phrase ‘living separately and apart’ adopted in cases such as *SZOXP* also provides an answer to the applicant’s concern that an applicant who is (physically) living separately and apart from a sponsor due to the sponsor’s care needs might be in a worse position than an applicant whose sponsor had died and who might still be able to meet the time of decision criteria in cl 820.221(2)¹ of the Regulations. Quite clearly, there could be cases where the Tribunal could find that an applicant and sponsor do not live separately and apart on a permanent basis, and otherwise meet the definition of ‘spouse’, notwithstanding that the applicant and the sponsor do not physically live together. However, this was not such a case.

66 The ground before me requires me to consider whether the Tribunal acted illogically, irrationally or unreasonably in finding that the factors in reg 1.15A(3) of the Regulations do not attest to the genuine and continuing spousal relationship between the applicant and the

¹ Clause 820.211(2) is a time of decision criteria that relevantly provides that an applicant meets the requirements of the subclause if the applicant would continue to be the spouse or de facto partner of a person who is an Australian citizen, permanent resident or eligible New Zealand citizen, except that the sponsoring partner had died; and satisfies the Minister that they would have continued to be the spouse or de facto partner of the sponsoring partner if the sponsoring partner had not died; and has developed close business, cultural or personal ties in Australia.

sponsor. I have explained above why I do not consider that the Tribunal's reasons are illogical, irrational, or unreasonable. Nothing in the authorities cited by the applicant post-hearing changes my views on that.

67 In circumstances where I have found that there is no jurisdictional error, it is not necessary to consider the Minister's submissions on futility.

CONCLUSION

68 I have found that there is no jurisdictional error in the Tribunal decision. It follows that the application is dismissed.

I certify that the preceding sixty-eight (68) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Ladhams.

Associate:

Dated: 26 April 2022